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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-773

SCOTT HUDGENS, AN INDIVIDUAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Scott Hudgens, an individual (herein "Hudgens"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on October 18, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (A1-A15) is reported at 501 F. 2d 161. The supplemental decision and order of the National Labor Relations Board (A17-A20) is reported at 205 NLRB No. 104 (1973). The initial decision and order of the Board (A33-40) is reported at 192 NLRB No. 111 (1971).

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit (A1-A15), enforcing the supplemental decision of the National Labor Relations Board, issued on September 25, 1974. The Court thereafter entered judgment (A16) on October 18, 1974. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

I.

Do the standards of *Babcock and Wilcox*[1] govern when private property rights are to be dislocated in favor of rights under the National Labor Relations Act where there is no labor dispute at the picketed premises; or, as held by the lower court, does *Central Hardware*[2] require that such standards be limited to organizational campaigns only?

II.

If *Babcock and Wilcox* principles are confined to adjusting property rights only in an organizational context, to what extent are alternative avenues of communication required to be utilized before property rights may be confiscated when the activity involved is only indirectly related to the situs?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.* (the "Act") are set forth below:

* * * * *

1. *N. L. R. B.* v. *Babcock and Wilcox Co.*, 351 U. S. 105 (1956).
2. *N. L. R. B.* v. *Central Hardware Co.*, 407 U. S. 539 (1972).

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

* * * * *

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

STATEMENT OF THE CASE

Petitioner's North DeKalb Shopping Center, located in Decatur, Georgia, is a modern complex in which a substantial investment has been made to secure a comfortable and attractive enclosed mall shopping area to permit shopping in an atmosphere free of distraction or interference.

One of the Center's sixty tenants is the Butler Shoe Store which has nine retail stores in the greater Atlanta, Georgia area. Although no employee of that store was involved in any union activity, and there was no labor dispute at the Center, various individuals employed by Butler at its Atlanta warehouse and represented by Local 315, Retail and Wholesale Department Store Union, engaged in picketing at the Center. The picketing, which also occurred at the other Butler retail stores, was conduced in the midst of the common aisleways of the Center's enclosed mall adjacent to the Butler store in furtherance of the Union's contract demands at the warehouse.

When the pickets declined the Center manager's request to remove themselves to an area outside of the enclosed mall, he threatened to have the police remove them. They then left

and filed charges with the Board which found that a violation of section 8(a)(1) of the Act was thereby committed. (A33-A40.) Hudgens immediately sought review, pursuant to section 10(b) of the Act, in the Court of Appeals for the Fifth Circuit.

During the pendency of that appeal, this Court's decisions in *Central Hardware* and *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972), issued, and the Board obtained a remand to reconsider its decision in light of those cases. In its supplemental order (A17-A20), which is the subject of this proceeding, the Board professed to apply the *Babcock* standards, but did not. Instead, when the case again was heard on Hudgen's petition for review to the Fifth Circuit, Board appellate counsel expressly disavowed any reliance on *Babcock* (A6); and the court below found *Babcock* inapplicable, holding that it applies to *organizational* activities only. In lieu of *Babcock*, the court posited a new test: that where, as here, activity conducted on private property is *indirectly* related to that property, it must be permitted, in derogation of private property rights, since alternatives thereto are, in the Court of Appeals' view, rarely available (A12-15). In short, by emasculating the doctrine of alternative channels of communication, the Court defined that standard out of existence.

REASONS FOR GRANTING THE WRIT

Review by this Court of the decision below is warranted. *First*, by rejecting the settled *Babcock and Wilcox* doctrine, and adopting instead wholly different criteria for adjusting constitutionally protected private property rights with section 7 activity, the decision below has occasioned a substantial dislocation in the administration of the National Labor Relations Act. *Second*, the decision below undesirably conflicts with a recent decision[3] of the Court of Appeals for the Third Circuit. *And finally*, if, as the lower court held, *Babcock and Wilcox* does not apply, this Court should direct itself to a question it hereto-

3. *N. L. R. B.* v. *Visceglia, t/a Peddie Buildings*, 498 F. 2d 43 (3rd Cir. 1974).

fore has not decided—the scope of the alternatives required to be utilized where the activity at issue is only *indirectly related* to the purposes to which the private property is being utilized.

A. For nearly two decades of uniform application—up to the subject decision of the Court of Appeals—*Babcock and Wilcox* has mandated that the section 7 rights of non-employees must yield to the constitutionally protected rights of private property owners. The only exception was where alternative channels of communication were shown to be unavailable. The instant case emasculates that settled principle. In the lower court's view, *Babcock and Wilcox* is, contrary to the Board's own view (A6, A31), confined only to union *organizational* activity and is rendered inapplicable to other forms of section 7 activity. All other activity is to be evaluated by a different standard purportedly derived from the *constitutional* principles applied by this Court in *Lloyd* and *Logan Valley*[4] (A8-9, A13.)

This view flies in the face of the plain teaching of *Central Hardware* that constitutional principles do *not* control in assessing whether there is a violation of the Labor Act. *Central Hardware*, in fact, rejected precisely such a constitutional concept and this Court, in remanding that case to the Board for reconsideration in light of *Babcock and Wilcox* (407 U. S. at 545), declared that "[w]hile it is true that Logan Valley involved labor picketing, the decision rests on constitutional grounds, it is not a §7 case." Indeed, recognizing this import of *Central Hardware*, the Board in the instant case, after obtaining a remand from the Court of Appeals to reconsider its original order in light of *Central Hardware*, stated that "[c]learly the test now to be applied to the case at bar is that set out in *Babcock and Wilcox*." (A31.) The Court of Appeals' contrary view—that "[p]roper resolution of the instant case cannot be reached through . . . *Babcock and Wilcox* . . ."—ignores the section 7 nature of this case and carves out an unwarranted exception to *Central Hardware*.

4. *Amal. Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968).

B. There is no justification for the Court of Appeals' refusal to follow *Babcock and Wilcox* and *Central Hardware*. It is anomalous, in light of the objective of the Act, to impose upon those persons seeking to exercise organizational rights—rights which embody the heart of the Act—the obligations imposed by *Babcock and Wilcox*, while at the same time permitting individuals exercising nonorganizational activity—which is assumedly less protected by the Act—freedom from those very obligations. Moreover, whether activity is organizational in purpose or not, the same media devises used by Butler and Hudgens to draw potential customers to the Center similarly constitute viable alternatives for inviting customers *not* to patronize. There is no reason to differentiate the instant case, merely, because of the Union's desire to engage in consumer picketing, and to thereby conclude "the quantum and type of proof which *Babcock and Wilcox* and its progeny . . . require" to be irrelevant. (A13.) The Union, after all, was involved in an economic contest[5] in which, to exert maximum pressure, it sought to communicate its message throughout the greater Atlanta area. If, as Hudgens proved (A13), other means of communication besides picketing were actually less expensive and more effective, why would utilization of such methods be "unreasonable" and only "a location at or near the mall" (A14) suffice? This distorted view of available alternates requires, it is submitted, review by this Court.

C. The Court of Appeals' decision also directly conflicts with the recent decision of the Court of Appeals for the Third Circuit in *N. L. R. B.* v. *Visceglia, t/a Peddie Buildings*, and hence creates an undesirable lack of uniformity in the administration of the Act.

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5. The Board (A30) thus erred in concluding that the Union should not be required to "squander its assets in this fashion." The Act does "[not] contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *N. L. R. B.* v. *Ins. Agents Int'l Union*, 361 U. S. 477, 490 (1960).

In *Peddie*, the owner of an industrial park was, like Petitioner here, found guilty of violating section 8(a)(1) for threatening with arrest persons who, although they had no work relationship at the situs, nevertheless engaged in nonorganizational picketing on park property in furtherance of an economic dispute with one of the park's tenants. This conclusion was premised on the Board's view that, for "the reasons expressed by the Supreme Court in *Central Hardware, supra*, we find . . . the principles of *Babcock and Wilcox* . . . to be applicable to the present case." 203 NLRB No. 27, 83 LRRM 1066 (1973). Thereafter, in the instant case, the Board applied the same reasoning; it expressly predicated its finding of Hudgens' violation on "the reasons specifically set forth in [*Peddie*]." (A18.) Subsequently, however, the Third Circuit denied enforcement to the Board's order in *Peddie* on the ground that "the Board did not evaluate qualitatively or quantitatively a significant number of ingredients in the [*Babcock*] balancing test which it applied." 498 F. 2d at 50. Thus, in the Third Circuit, *Babcock* applies and non-employees must prove, under that test, the unavailability of alternative channels as a condition to appropriating constitutionally protected private property rights in the name of section 7, regardless of whether the purpose of the activity involved is organizational or not.[6] A far different rule, as described above, applies in the Fifth Circuit. This undesirable dislocation in the administration of the Act is a further reason for review by this Court.

D. Even assuming *arguendo* that the *Babcock and Wilcox* test does *not* apply in the present case, then this Court should resolve the question of what constitutes an alternative avenue of communication where, as here, the activity involved is only *indirectly related* to the purposes of the Center. The "indirectly related" situation is one which this Court has specifically recog-

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6. The Court of Appeals' assessment that "the picketing in the instant case [is] clearly distinguishable from that in *Peddie Buildings*" (A15 n. 14) is wholly unexplained and unjustified. The two cases, as the Board concluded, must be governed by the same criteria regardless of whether, on the facts, those criteria would yield the same or a different result.

nized, but with respect to which it has not yet established the requisite standards. This case, accordingly, provides an appropriate vehicle for considering this important recurring question.

Neither *Lloyd* nor *Logan Valley* is dispositive of the "indirectly related" issue. In *Lloyd*, the disputed conduct was totally unrelated to Lloyd Center. On the other hand, in *Logan* the picketing was directly related to the non-union status of employees at the Weis Supermarket located in the center there involved; *Logan* was a "directly related" situation *because* "the message sought to be conveyed to the public concerned the *manner in which the particular market was being operated.*" *Lloyd*, 407 U. S. at 560, quoting *Logan*, 391 U. S. 320 n. 9 (emphasis added). Because the picketing in *Logan* was thus directly related to the manner in which a center store was being operated, reliance on alternative means of communication was only minimally required, as the property owner had it within his power to correct the alleged abuses. Conversely, in *Lloyd*, where there was no dispute concerning the manner of operation of the center or a tenant's business and, therefore, nothing the property owner could do to resolve the subject of the protest, there was a far greater need to examine available alternatives as a condition to dislocating property rights. *Lloyd*, 407 U. S. at 567.

The subject case, it is submitted, is closer to the *Lloyd* situation due to the undisputed absence of any labor dispute at the North DeKalb Center's premises or any concern with "the manner in which [a] particular [store] was being operated."[7] It is, at most, an "indirectly related" situation—a situation this

7. Here, as in *Lloyd*, there was no dispute at the situs of the Center. In *Lloyd*, the message was aimed at the general population of the greater metropolitan area. Similarly, here, the Union picketed at all nine Butler locations in the greater metropolitan area, in an effort to reach the population of greater Atlanta. Thus, the alternatives required to be utilized in *Lloyd*, should similarly be required here, especially because, as demonstrated below, alternatives, such as the media utilized by the property owner; are actually more effective and less expensive than the cost of maintaining pickets at all nine locations.

Court recognized in *Lloyd*, 407 U. S. at 564, but did not consider with respect to required reliance on alternatives to picketing. Because of the significance of this problem and the necessity, demonstrated by this case, to resolve this unanswered question of *Logan Valley* and *Lloyd* as well as the conflict between the standards enunciated in this case and *Peddie*, certiorari should be granted to provide much needed guidance in this area.

CONCLUSION

For the foregoing reasons, Scott Hudgens respectfully prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
Fifth Circuit

Sept. 25, 1974

SCOTT HUDGENS, an Individual,
Petitioner-Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross-Petitioner.

No. 73-3264

Before WISDOM and CLARK, *Circuit Judges,* and GROOMS, *District Judge.*

CLARK, *Circuit Judge:*

This case requires us to reach an accommodation under the National Labor Relations Act (NLRA) between private property rights and the right to picket in aid of a legal strike. The specific issue presented is whether a shopping center owner violated sections 7 and 8(a)(1) of the NLRA[1] by prohibiting warehouse employees of the company owning one of the center's retail store tenants from picketing the entrances to the store in aid of a strike by the warehouse employees. We affirm the find-

1. Section 7, 29 U. S. C. § 157, provides in relevant part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

Section 8(a)(1), 29 U. S. C. § 158(a)(1), provides in part:

"It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title."

ing by the National Labor Relations Board (Board) of an unfair labor practice and enforce its order.

I.

The individual petitioner, Scott Hudgens, owns North DeKalb Shopping Center, a large 60-store retail shopping center located in unincorporated suburban Atlanta, but drawing its customers from throughout the metropolitan Atlanta area. Like many modern shopping centers, this one consists of a single large building constructed around an enclosed mall. The mall provides an arcade 40 feet in width which is intersected by 30 foot wide auxiliary aisles connecting it to public entrances opening on the surrounding parking area. Although some center stores have entrances fronting only the parking lot and a few can be entered from either the mall or the parking area, most can only be entered from the mall. Eighty-five to ninety percent of the customers of these latter stores enter the building through one of the four primary entrances to the mall. A raised sidewalk encircling the building separates it from the large adjacent parking lot. There are five driveway entrances to the parking lot. Hudgens, as landlord, has a continuing interest in the commercial success of the center's tenants, since his leases with all but one of the stores are of the percentage type, *i.e.*, rentals are calculated on a ratio of a tenant's gross sales over a guaranteed minimum rent. Additionally, Hudgens maintains a security system and exercises control and care of the common areas of the shopping center, including the mall itself and the parking lot.

In January 1971 warehouse employees of the Butler Shoe Company in Atlanta went on strike protesting the company's failure to agree to certain union demands in its contract negotiations with Local 315, Retail and Wholesale Department Store Union AFL-CIO, the bargaining representative of the warehouse employees.[2] To support this strike, the union decided to picket

2. The employees of Butler's store in the North DeKalb Shopping Center are non-union.

not only the Butler's warehouse but all of its retail stores in the Atlanta area as well.[3] Accordingly, on January 22, 1971 four warehouse employees went to North DeKalb Mall with signs reading "Butler Shoe Warehouse on Strike, AFL-CIO Local 315" to picket the two entrances to the Butler Shoe Store, both located inside the mall. Before the store opened for the day's business, Douglas Ballard, the general manager of the shopping center, noticed the potential pickets and asked them to leave, stating that picketing was not permitted in the mall under any circumstances.[4]

The warehouse employees left, but returned within the hour and began picketing in front of the entrances to Butler's.[5] After they had picketed for about thirty minutes, Ballard informed them by telephone that he would have them arrested for trespassing, if they continued. The pickets then departed, and subsequently, the union filed an unfair labor practice charge against Hudgens with the Board.

II.

On stipulated facts the Board interpreted Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U. S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968);[6] to hold

3. Except for Hudgens' actions, all such picketing was without incident.

4. There is a conflict in the record as to exactly what Ballard told the pickets. At the remand hearing three of the pickets testified that Ballard told them that they would have to leave the property entirely and picket on the public streets surrounding the shopping center. An affidavit by Ballard, attached as an exhibit to the parties' stipulation, supports this testimony. Ballard testified on remand, however, that he said: "[w]e don't allow people to picket on the mall. They have to be outside on the sidewalk or either at North Druid Hills or Lawrenceville Highway on the right-of-way, one or the other . . . [y]ou just don't picket on my mall."

5. This picketing was peaceful and limited to the mall area immediately adjacent to the Butler's store entrances.

6. *Logan Valley* held that a state court injunction secured by a shopping center owner prohibiting picketing in protest to the non-union status of one of the center's stores violated the pickets' First

that a shopping center, during the times that it is open and accessible to the public, is the functional equivalent of the community business block, long associated with the exercise of First Amendment rights;[7] and that the mere fact of ownership was not enough to "justify restrictions on the place of picketing." It then found "that *Logan Valley* establishes the union's right to picket at the location it chose, and that the Respondent's (Hudgens') threats to cause the arrest of the pickets for criminal trespass if they continued to refuse to leave the enclosed mall, unlawfully interfered with protected concerted activities in violation of section 9(a)(1) of the Act."[8]

During the pendency here of Hudgens' petition for review of this decision, the Supreme Court decided Lloyd Corp. v. Tanner, 407 U. S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972) and Central Hardware Co. v. NLRB, 407 U. S. 539, 92 S. Ct. 2238, 33 L. Ed. 2d 122 (1972). In *Lloyd* the Court upheld the right of the corporate owner of a large Portland, Oregon shopping mall to apply its non-discriminatory no solicitation rule to exclude anti-Viet Nam war pamphleteers from the center's interior. Finding that the constitutional inquiry must be broader than a

and Fourteenth Amendment free speech rights. The Court relied heavily on Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), which had considered the streets of a company owned town as the functional equivalent of a public business district for purposes of allowing First Amendment activity and held that a shopping center was similarly the functional equivalent of a public business district at least under the facts of that case.

7. *See, e.g.*, Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).

8. The Board's order required Hudgens to "[c]ease and desist from threatening to cause the arrest of any union members while peacefully picketing as part of protected concerted activity within the enclosed mall area of Respondent's shopping center, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights of self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; and to refrain from any and all such activities."

simple in rem determination of whether a particular shopping center is the functional equivalent of a municipal business district, *Lloyd* established the appropriate initial inquiry to be whether the conduct assertedly protected by the First Amendment was "directly related in its purpose to the use to which the shopping center property [is] being put," 407 U. S. at 563, 92 S. Ct. at 2226, 33 L. Ed. 2d at 140. If so, giving explicit recognition to the shopping center owner's constitutionally protected private property rights, the Court held that an accommodation between these rights and the asserted First Amendment rights required those asserting the right to use the property of another to show that reasonable alternative means of conveying their message to its intended audience are unavailable before access for this purpose will be required. Since the message in *Lloyd*, intended for the general public, had no relationship to the operation of the shopping center, and since other means of reaching such a generalized audience were readily apparent, the Court found that neither of these criteria had been met.

In *Central Hardware* the owner of two self-contained non-union retail hardware stores had prohibited non-employee union organizers from soliciting his employees in the stores' parking lots. The Board held that the "character and use" of Central's parking lots made *Logan Valley* controlling, and the Eighth Circuit affirmed. In reversing, the Court noted that *Logan Valley* rested on constitutional grounds, and was not a section 7 case. It then held that the controlling standards were those set out in NLRB v. Babcock & Wilcox Co., 351 U. S. 105, 76 S. Ct. 679, 100 L. Ed. 975 (1956). *Babcock & Wilcox* held that non-employee organizers seeking to solicit on an employer's private property must show, as a precondition, a lack of reasonable alternative means of reaching the employees. Furthermore, in *Central* the Court went on to note that in any event the Board had misapplied *Logan Valley*, since in order to meet the Fourteenth Amendment's threshold state action requirement, property must have assumed "to some significant degree the functional

attributes of public property devoted to public use," 407 U. S. at 547, 92 S. Ct. at 2243, 33 L. Ed. 2d at 128, a circumstance present in *Logan Valley* (and in *Lloyd*) but not present in the case of Central's parking lot.

In view of the relevance of *Lloyd* and *Central Hardware*, we remanded the instant case to the Board for reconsideration, a hearing was held before an administrative law judge, and evidence was presented to supplement the prior stipulation. The administrative law judge read *Central Hardware, supra,* to require him to apply the *Babcock & Wilcox Co.* test, but he found that since "the union had no other reasonable access to Butler's customers coming to the DeKalb shopping center," its requirements had been met. The Board affirmed the administrative law judge's decision for the reasons it had previously set out in Frank Visceglia and Vincent Visceglia, d/b/a Peddie Buildings, 203 NLRB No. 27, enforcement denied, N. L. R. B. v. Visceglia, 498 F. 2d 43 (3d Cir. 1974).[9] Its rationale was that Butler's warehouse employees were within the scope of Hudgens' invitation to the public to come to the shopping center to do business with its tenants; "[t]hat being the case, Butler's employees could not be designated as unacceptable and excluded from the mall solely because they chose to engage in protected concerted activity." Furthermore, the Board was of the view that picketing directly in front of Butler's store would avoid the possible secondary effects attending picketing at a more distant location, which might "well be a common situs for entrance to other places of business."

III.

Changing horses in midstream, the Board argues on appeal that this case is controlled by Republic Aviation Corp v. NLRB, 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945).

9. *Peddie Buildings* involved picketing on private property at the entrance to an industrial park in which was located a plant owned by the company that was the subject of the picketing.

Republic Aviation approved the Board's *Peyton Packing Co.* presumption, 49 NLRB 828 (1943), enforced, 142 F. 2d 1009 (5th Cir.), cert. denied, 323 U. S. 730, 65 S. Ct. 66, 89 L. Ed. 585 (1944); which held it to be an unfair labor practice for an employer to enforce a no solicitation rule against employee organizers unless it could be proven that such a rule was necessitated by special circumstances, *i.e.*, to maintain production or discipline. The availability of alternative means for the employee organizers to communicate with the other employees is not relevant to this inquiry.[10] Therefore, the Board reasons that since Hudgens offered no proof the picketing interfered with the normal functioning of the shopping center, the pickets could not be excluded.

Hudgens' main appellate argument is that *Central Hardware* requires this case be adjudicated by the standards of *Babcock & Wilcox*. He contends that the Board's General Counsel failed to carry his burden of proving there were no "other available channels of communication" which would have enabled the union to reach its intended audience with its message, *see, e.g.*, Diamond Shamrock Co. v. NLRB, *supra,* n. 10; McDonald Douglas Corp. v. NLRB, 472 F. 2d 539 (8th Cir. 1973); and NLRB v. Tamiment, Inc., 451 F. 2d 794 (3d Cir. 1971). Additionally, Hudgens argues that his evidence established that "[t]he union in this case manifestly had countless, varied means of communication, in addition to the picketing here at issue, available to reach its desired audience," including picketing at the four entrances to the enclosed mall, in the parking lot, and on the public thoroughfares near the shopping center; advertising by newspaper, radio and television; and use of other media, such

10. This is the rule in this circuit, *see* Republic Aluminum Co. v. NLRB, 394 F. 2d 405 (5 Cir. 1968) (en banc), and apparently the majority rule, *see* Diamond Shamrock Company v. NLRB, 443 F. 2d 52, n. 27 (3d Cir. 1971). The Third Circuit however, requires that the Board consider whether alternative means of communication are available before invalidating an employee no solicitation rule. *See* NLRB v. Rockwell Mfg. Co., 271 F. 2d 109 (1959).

as direct mail, handbills, and billboards to reach potential Butler's customers.

Proper resolution of the instant case cannot be reached through a per se application of either *Republic Aviation* relied upon by the Board, or *Babcock & Wilcox* relied upon by Hudgens. Both of those cases balanced conflicting interest to reach an accommodation.[11] There is no question that employees have the abstract right to picket their employer wherever he is located, *see* NLRB v. Local 810, Sheet Metals, etc., 460 F. 2d 1 (2d Cir. 1972); and Local 761, Electrical Workers v. NLRB, 366 U. S. 667, 672, 81 S. Ct. 1285, 1289, 6 L. Ed. 2d 592, 596 (1961). However, equally valid are Hudgens' property rights. The requisite solution of this case requires a balancing of the two, but because the interests are significantly different neither formula urged by the parties exactly fits. The Board's position is farthest afield. It takes a very broad view of who is to be considered an employee of Butler's within the rule of *Republic Aviation*, then uses the result as a basis for impinging upon the property rights of Hudgens, who clearly is not their employer in even the broadest sense. Such a misapplication of *Republic* is particularly inappropriate, because there the employee organizers "were lawfully and properly on the employer's premises pursuant to the work relation-

11. *Republic Aviation* placed in the scales the relevant labor-property interests where an employer had banned all solicitation of fellow employees by union adherents already in his employ. *Babcock & Wilcox* balanced organizational rights asserted by non-employees against an employer's property rights. In this latter case, the Court said:

> "Accommodation between [organization rights and property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organizations; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."

351 U. S. at 112, 76 S. Ct. at 684, 100 L. Ed. at 982.

ship;" hence no employer interests existed which are comparable to the private property rights of Hudgens in the instant case.[12] Furthermore, any decision in this case which ignored or failed to weigh Hudgens' property rights would disregard the emphasis in *Lloyd* and *Central Hardware* on the need for protection of such rights.

Hudgens' insistence that we are bound to apply the test of *Babcock & Wilcox* is not technically correct. There, the property rights were those of the employer, not a third party; and the labor rights involved were organizational rights, not consumer picketing rights. Indeed in both *Babcock & Wilcox* and *Central Hardware* the court carefully limited its consideration to organizational cases. Although the consideration of alternatives required by *Babcock & Wilcox* is relevant to proper resolution of today's case, it is not the complete answer in consumer picketing cases.

IV.

Recognizing that the rules urged upon us by both Hudgens and the Board do not address themselves to the kind of variables present in the instant case, the United States Chamber of Commerce as amicus curiae has suggested a different tack. It urges that we should apply a test it derives by blending *Lloyd* and *Logan Valley, i.e.*, "private property becomes subject to protest or propaganda activity when both of the following are satisfied: (a) the protest is related to the use to which the property is put and (b) there exists no reasonably effective alternative means of communication to reach the intended audience." Amicus' argument that criterion (b) has not been satisfied tracks Hudgens' arguments as to failure to satisfy *Babcock & Wilcox*. It

12. The controlling significance of this difference in rights was recognized in Diamond Shamrock Co. v. NLRB, *supra*, a case which applied the non-employee standards of *Babcock & Wilcox* rather than the employer standards of *Republic Aviation* to organizational solicitation by off-duty employees. *See also*, GTE Lenkurt, Inc., 204 NLRB No. 74 (1973), and NLRB v. Great Atlantic & Pacific Tea Co., 277 F. 2d 759 (5th Cir. 1960).

further argues that criterion (a) was not satisfied either because the direct relationship test here would require that the picketing involve a shopping center store in the sense that "the adverse effects of the dispute must directly jeopardize the employees working at that site (the store tenant)."[13]

Section 7 rights are not necessarily coextensive with constitutional rights, *see* Central Hardware v. NLRB, *supra* (Brennan, J., dissenting). Nevertheless, we agree that the rule suggested by amicus, although having its genesis in the constitutional issues raised in *Lloyd*, isolates the factors relevant to determining when private property rights of a shopping center owner should be required to yield to the section 7 rights of labor picketers. The first consideration—the relationship between the picketing and shopping center operations—is relevant to determining whether the pickets have any right at all to conduct consumer-employer picketing inside a private enclosed mall, while the second consideration assays these picket rights against the conflicting property rights of the center owner. However, we do not apply these dual considerations in the same manner as amicus, nor de we reach the same result.

A. *Relationship Between the Picketing and Normal Functions of the Shopping Center*

The objects of the picketing were those employed by and those who might patronize the Butler store in the North DeKalb Mall, and the message concerned the fact that ware-

13. Amicus argues that the picketing must be at least as directly related to the business of the shopping center as the picketing was in *Logan Valley*. For this proposition amicus relies on Mr. Justice Marshall's caveat in footnote 9 of *Logan Valley*:

> "[w]e are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not *thus* directly related in its purpose to the use to which the shopping center was being put." [Italics ours]

391 U. S. at 320, 88 S. Ct. at 1609, 20 L. Ed. 2d at 613 (1968); and Mr. Justice Douglas's concurring opinion in *Logan Valley*.

house employees of Butler's were on strike. Potential customers of Butler's North DeKalb store comprised a group within the scope of the broad invitation issued by Hudgens to the public to come and shop at center stores. The picketers' message to withhold patronage from the Butler store was directly related to Hudgens' invitation, although not specifically related to the operation of the particular Butler store in the North DeKalb Mall. The appropriate focus is on the message sought to be conveyed and its intended audience, not, as the amicus urges, on whether the labor dispute in fact was precipitated by something involving the operation of one particular store in the shopping center. The Court's opinion in *Lloyd* reflects the need to focus on the scope of the invitation extended to the public. *See* 407 U. S. at 556-566, 92 S. Ct. at 2226-2227, 33 L. Ed. 2d at 135. Indeed, the issue in that case distinctly included the extent of dedication to public use and not simply the degree of relationship between the actual operation of the shopping center and the picketing. Neither logic nor precedent requires that picketing be directly related to the actual operation of an individual store in the shopping center as was the case in *Logan Valley*. Although the facts in *Lloyd* were different—the anti-Viet Nam War handbilling here had "no relation to any purpose for which the center was built and being used," 407 U. S. at 564, 92 S. Ct. at 2226, 33 L. Ed. 2d at 140—the rationale is fully applicable here.

Additionally, acceptance of the strict relationship requirement urged upon us by amicus would mean that "businesses situated in the suburbs could largely immunize themselves from . . . criticism (in many circumstances) by creating a cordon sanitaire of parking lots around their stores." Logan Valley, *supra*, 391 U. S. at 325, 88 S. Ct. at 1612, 20 L. Ed. 2d at 615, cited with approval in *Lloyd*, 407 U. S. at 562, 92 S. Ct. at 2225, 33 L. Ed. 2d at 139. If we were to adopt such a narrow view, a chain which had all its retail outlets located in enclosed shopping centers could prevent direct picket con-

tact with its customers at all stores whenever the dispute was by workers in any non-retail division. Then too, if the dispute related to the operation of one particular store, only that store could be picketed. The result would be to confer upon an employer an ability to limit the effectiveness of publicizing labor disputes by insulating its trade inside shopping centers. Even where the union could prove the inadequacy of alternative means of reaching the customers of a store, effective picketing would be cut off. The end result would be that employees' protected right to picket their employer wherever he is located, *see* NLRB v. Local 810, Sheet Metals, Etc., *supra;* and Local 761, Electrical Workers v. NLRB, *supra,* would be nullified.

In short, we find the picketing in the instant case was sufficiently related to the business of the North DeKalb Shopping Center to meet the requirements of the relationship test enunciated in *Lloyd.*

B. *Alternative Channels of Communication*

What alternatives to picketing in the mall existed?

It is crucial for any analysis to recognize from its outset that the intended audience of the picketing in the instant case included not only the employees of Butler's at the North DeKalb Shopping Center but also the potential customers of Butler's North DeKalb store. This latter audience was only identifiable as part of the citizenry of greater Atlanta until it approached the store, and thus for the picketing to be effective, the location chosen was crucial unless the audience could be known and reached by other means.

This contrasts with organizational campaigns in which the audience solicited is composed of employees of a particular employer, a limited usually identifiable group, which often can be reached very effectively by means other than personal contact on the employer's private property. Indeed, in what is perhaps an implicit recognition of the judicial belief that this sort

of conduct can take place anywhere, courts have rarely found that the general counsel met the burden of proving a lack of adequate alternatives to solicitation on an employer's property. *See* NLRB v. Solo Cup Co., 422 F. 2d 1149, 1151 (7th Cir. 1970), quoting from Broomfield, Preemptive Federal Jurisdiction over Concerted Trespassory Union Activity, 83 Harv. L. Rev. 552 (1970), and *compare* NLRB v. S & H Grossinger's, Inc., 372 F. 2d 26 (2d Cir. 1967), *with* NLRB v. Kutsher's Hotel and Country Club, 427 F. 2d 200 (2d Cir. 1970), and NLRB v. Tamiment, 451 F. 2d 794 (3d Cir. 1971). Thus, the quantum and type of proof which *Babcock & Wilcox* and its progeny involving organizational rights require on the issue of alternative avenues of communication is not necessarily relevant here.

Hudgens certainly takes an over-broad position in urging that the General Counsel was required to establish that television and radio advertising, direct mailing, and other advertising devices directed at the geographical area from which the Butler's store at North DeKalb Shopping Center draws its customers would be unavailing. Such alternatives might be part of the General Counsel's burden in a particular organizational situation, *cf.* The Falk Corp., 192 NLRB 716 (1971), *but see* NLRB v. United Aircraft, 324 F. 2d 128, 130 (2d Cir. 1963). However as substitutes for consumer picketing in a case involving an audience not readily identifiable, and requiring saturation coverage of a large, populous geographical area, such a burden is patently inappropriate. Hudgens' testimony as to the low unit cost and the effectiveness of these advertising methods does not demonstrate that they constituted an acceptable substitute for picketing. That they were useful and utilized by the shopping center to attract customers from the general public does not establish that they were viable alternatives for taking the pickets' message to Butler customers and employees.

Indeed, even in *Lloyd* the Court did not consider this type of alternative, although the audience that the *Lloyd* handbillers

sought to reach, the public in general, might seem to lend itself to almost any kind of approach. It must also be noted that all of the Butler stores in the Atlanta area were being picketed at the time the instant dispute arose. Since North DeKalb Shopping Center draws its customers from the entire Atlanta area, it would be totally unreasonable to require the union to advertise through the entire Atlanta area to reach the potential customers of this one remaining store. An accommodation which required such a procedure would unjustifiably denigrate section 7 rights.

Lloyd burdens the General Counsel with the duty to prove that other locations less intrusive upon Hudgens' property rights than picketing inside the mall were either unavailable or ineffective. However, as previously noted, the realities of the situation establish that part of the audience the pickets sought to reach was not identifiable, other than as citizens of metropolitan Atlanta, until it approached the store. By the nature of the use to which the property was put and because of the advertised invitations of Hudgens and Butler's to shop at North DeKalb's stores, a location at or near the mall was essential to any kind of reasonably effective communication. The alternatives of picketing at the mall entrances or on the parking lots were not available to the union. Confronted with this conflicting testimony on this issue, the administrative law judge found as a fact that Ballard (the shopping center manager) told the pickets that they would have to remove themselves to the public thoroughfares. We accept this finding. *See* Great Atlantic & Pacific Tea Co. v. NLRB, 354 F.2d 707, 709 (5th Cir. 1966); NLRB v. Universal Packing & Gasket Co., 379 F.2d 269, 270 (5th Cir. 1967); and NLRB v. Longhorn Transfer Service, Inc., 346 F.2d 1003 (5th Cir. 1965). Nor was picketing on the public streets adjacent to the shopping center an acceptable alternative. The closest such location for picketing was approximately 500 ft. from the mall. The problems with this type of picketing were recounted in part by the Court in

Logan Valley: (1) difficulty in reading picket signs, (2) traffic danger to pickets and (3) difficulty and hazard in handing out handbills. *See* 391 U.S. at 321-322, 88 S.Ct. at 1610, 20 L.Ed.2d at 613. Additionally, the farther the message is removed from the point at which action is to be taken the greater the potential for dilution or total loss of effect. Of course this is a matter of degree. Clearly, a union does not have an absolute right to picket at every point of optimum effect regardless of its result upon other competing interests. Nevertheless, the potential for dilution is relevant to a consideration of adequate alternatives. Finally, picketing at the entrances to the shopping center parking lot or on the streets leading into the parking lot would render it difficult for the union to limit the effect of its picketing to Butler's only. *See* Logan Valley, supra, 391 U.S. at 323, 88 S.Ct. 1611, 20 L.Ed.2d 614.[14] Therefore, we hold that alternatives to picketing inside the mall were either unavailable or inadequate.

The petition for review is denied and the Board's order is Enforced.

14. *Peddie Buildings, supra,* relied upon heavily by Hudgens, even if binding upon us would not compel us to reach a different result, the picketing in the instant case being clearly distinguishable from that in *Peddie Buildings.*

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

SCOTT HUDGENS, an Individual
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 73-3264

JUDGMENT

Before: WISDOM and CLARK, *Circuit Judges*, and GROOMS, *District Judge*.

This Cause came on to be heard upon a Petition filed by Scott Hudgens, an Individual, to review an order of the National Labor Relations Board issued against Petitioner, his officers, agents, successors and assigns on August 16, 1971, as reaffirmed by its supplemental order of August 21, 1973, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 14, 1974, and has considered the briefs and transcript of record filed in this cause. On September 25, 1974, the Court handed down its decision granting enforcement of the Board's order and denying the petition for review.

On Consideration Whereof, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Scott Hudgens, an Individual, his officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

Entered: Oct 18, 1974

Issued as Mandate: Nov. 11, 1974

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL RELATIONS BOARD

SCOTT HUDGENS, an Individual
and
LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO
Case 10—CA-8823

SUPPLEMENTAL DECISION AND ORDER

On August 16, 1971, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that Respondent, Scott Hudgens, had violated Section 8(a)(1) of the National Labor Relations Act, as amended, by threatening to cause the arrests of the Charging Party's pickets, employees of the Butler Shoe Company, while they were engaging in protected activity under Section 7 of the Act and ordering that Respondent cease and desist therefrom and take certain affirmative action.

Thereafter, Respondent filed a petition for review and the Board filed a cross-petition for enforcement of the order with the United States Court of Appeals for the Fifth Circuit. While the case was before the court of appeals, the Supreme Court issued its decisions in *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539, and *Lloyd Corporation, Ltd.* v. *Tanner*, 407 U. S. 551. Thereafter, the Board moved the circuit court to remand the case so that the Board might reconsider the merits of the question raised in light of the two Supreme Court decisions. On November 17, 1972, the Board ordered a hearing to afford

1. 192 NLRB No. 111.

all parties an opportunity to offer evidence on the issues raised by the principles set out in the two Supreme Court decisions. On April 9, 1973, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Administrative Law Judge's Decision, the exceptions and brief, and the entire record in the case, and hereby reaffirms its earlier decision that by threatening to cause the arrests of the Charging Party's pickets, employees of the Butler Shoe Company's warehouse, while they were engaging in protected activity under Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act. While we agree with the Administrative Law Judge's recommendation that we reaffirm our earlier decision, we do so for the reasons specifically set forth in *Frank Visceglia and Vincent Visceglia, t/a Peddie Buildings*, 203 NLRB No. 27. The present case involves employee activity coming directly within the ambit of Section 7, viz. an economic strike engaged in by employees against their own employer. The striking employees were employed by Butler Shoe Company at its warehouse, which is located separately from any of its nine retail stores in the Atlanta area. They picketed their employer at each and every one of its retail stores. The employer's store in Respondent's shopping mall is not located on a public street but in a limited access location. Except for the fact that Respondent owned the property, there is no contention that Butler's employees were engaging in anything other than protected activity in picketing Butler's store.

Since the employees were engaged in what otherwise would be protected picketing, we find that their employer, whose store happens to be located within Respondent's shopping mall, was not insulated from that picketing merely because someone else, Respondent, was the technical owner of the shopping mall and the land surrounding it. In this regard, we note that Respondent's property rights in the shopping mall were not limited to its exclusive use. Indeed, to limit the mall to that use would have defeated its purpose and that of Respondent's tenants whose businesses were open to the public, as well as their employees. Clearly, it was Respondent's intent to permit use of the shopping mall to these classes of persons, and that thus Butler's employees were within the acceptable groups. That being the case, Butler's employees could not be designated as unacceptable and excluded from the mall solely because they chose to engage in protected concerted activity.

Furthermore, we are of the view that our interpretation achieves a desirable accommodation between the Respondent's property rights and the employees' Section 7 rights by according employees the right to picket their employer at such a proximate location, directly in front of the employer's premises, rather than requiring them to picket at a more distant location which may well be a common situs for entrance to other places of business and thus invite secondary effects.

ORDER

Pursuant to Section 10(c), as amended, and on the basis of the Administrative Law Judge's Decision and the entire record in this case, the National Labor Relations Board hereby reaffirms its order previously issued herein and orders that Respondent, Scott Hudgens, an Individual, Atlanta, Georgia, his officers, agents, successors, and assigns, shall take the actions set forth in the Board's previous decision.

Edward B. Miller,
Chairman

John H. Fanning,
Member

John A. Penello,
Member

(Seal) National Labor Relations Board

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SCOTT HUDGENS, An Individual and LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO	Case 10—CA-8823

Administrative Law Judge's Decision

POSTURE OF THE CASE

Thomas A. Ricci, A. L. J.: Upon a stipulated statement of fact, all parties agreeing to waive a hearing before an Administrative Law Judge, the Board issued a Decision and Order in this case on August 16, 1971, finding that the Respondent, Scott Hudgens, an individual, had violated Section 8(a)(1) of the Act by restraining and coercing employees in their exercise of the rights guaranteed by Section 7 of the statute. While the case was before the United States Court of Appeals for the Fifth Circuit, in review and enforcement proceedings, the Supreme Court issued its Decisions in *Central Hardware* v. *N. L. R. B.*, 407 U. S. 539, and *Lloyd Corporation, Ltd.* v. *Tanner*, 407 U. S. 551. In order to reconsider the merits of the question raised in the light of those two decisions, the Board then moved the Circuit Court to remand the case, and on November 17, 1972, ordered a hearing to afford all parties an opportunity to offer "evidence on the issues raised by the principles set out" in the two Supreme Court decisions.

The remand hearing was held on February 1, 1973, at Atlanta, Georgia; all parties participated. Briefs were filed by the General Counsel and the Respondent.

Upon the record there made, from my observation of the witnesses, and on the basis of the record as a whole, I make the following findings of fact, recommendations and conclusions.

The question presented

Like all hearings in proceedings before the Board, this too, in the language of the remand, was ordered to receive "evidence"; this means proof of facts that may or may not shed light on questions of law that are raised. The question itself, especially in this case, remains the same. As the Board said in its original Decision:

> The sole issue in this case is whether, in the circumstances, the threat to arrest employees engaged in peaceful picketing of a business enterprise located within an enclosed mall shopping center is violative of Section 8(a)(1) of the Act.

The critical and most pertinent facts were set out plainly by agreement of the parties in their stipulation at the outset. The case involves an "enclosed mall shopping center" and the right of a union peacefully to picket a business enterprise located inside the mall. The entire property, or real estate, is owned by the Respondent, covering 55 acres of land, 60 rented stores where separate commercial tenants do business with the public, and a surrounding parking lot accommodating 2,640 automobiles. The closest public property—highways and streets bordering the privately owned land—is about 500 feet away from the enclosed structure which is the mall itself. The Union, engaged in a labor dispute with a single employer who owns and operates one of the commercial establishments inside the center—where it sells shoes, tried to picket at the entrance of the store, in the very area where the public is invited to shop at any of the many stores. Hudgens, the individual owner of the entire complex, and Respondent now, threatened to have the Union pickets arrested

for trespassing on his land. Is such a threat, based on the property right of the owner, nevertheless a violation of the National Labor Relations Act?

In concluding that Hudgens had violated Section 8(a)(1) in this situation, the Board rested the finding upon the decision of the Supreme Court in *Logan Valley*, 391 U. S. 308 (1968), where union picketing on the property of a comparable shopping center had also been held permissible. That case involved the balancing of the rights of a private property owner against the constitutional right of free speech in union representatives or employees. In 1972 the Supreme Court had occasion to pass upon the right of employees or union representatives to picket on private property in the exercise of rights flowing from congressional enactment of the NLRA, here called Section 7 of the Act: *Central Hardware Co.* v. *N. L. R. B. supra.* Now the Court said that the test of lawful union activity under the labor act, in the balancing against the right of private property, is not that enunciated in *Logan Valley* for evaluating constitutional prerogatives, but a different one. In *Central Hardware* the Court reverted back to its earlier decision in *Babcock and Wilcox,* 351 U. S. 105 (1956), where it had been ruled that private property rights need only yield to concomitant union rights where there is no other reasonable access to those persons to whom the union has a right to communicate its message, whatever it might be. In the light of these precedents, the more precise question in this case would seem to be whether, in the factual circumstances presented by a single shoe store (Butler) doing business as only one of 60 merchants in the DeKalb Mall, it can be said that other than picketing right in front of the store entrance inside the center, the Union had no other reasonable access to that segment of the public it wished, and had a right to reach. In landmark decisions there will inevitably be dicta and cross references to this or that principle of law, and the above-mentioned decisions of the Court are no different than most in this respect. In consequence many arguments and broad contentions are ad-

vanced on the basis of one juridical phrase or another, as though different cases not yet considered could be disposed of summarily without full consideration. It is important, therefore, at the outset, to remove from the gray area of confusion a number of distracting ideas, whether injected into the picture by accident or design. The air will be clarified and the case better understood if it be made clear what this case is *not* about.

(1) The object of the picketing was not to "organize"—i.e. literally to win into union membership—the employees who worked in that one shoe store inside the mall. It was instead to publicize the fact the Union was unable to convince the shoe company to a collective-bargaining agreement covering its warehouse employees who work at another location, some distance from the mall. In discussing the relative rights of real property owners against that of unions to picket, the Supreme Court, in one or two phrases appearing in *Central Hardware*, seemed to limit picketing rights to "an organizational campaign," "accommodation between organizational rights and property rights." It also said ". . . the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' Section 7 rights." Section 7 of the Act, of course, includes the right to "assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." If the limited phrase "organizational rights" be taken in isolation and in its literal sense, it would mean that in no situation other than an attempt to persuade particular employees to join a union, need private property rights ever yield to the statutory rights of union pickets. In that event there would be an end to this case right here and now, and the complaint must be dismissed. Clearly the Court did not in that decision establish such a rule of law; and the Respondent conceded as much when it proved the Union could have flown a banner by plane over the Atlanta stadium when 56,000 spectators were cheering the football Falcons. If this be "reasonable access" to the persons the Union had a right to

reach, the audience of necessity is larger than the salesman in the one shoe store.

(2) There was nothing secondary about this picketing. The shoe company utilizes separate corporate entities for its warehouse and its retail stores; the Union represents the warehouse employees and was in process of negotiating a new contract; it does not represent the store employees, and if it did, the two groups—store as distinguished from warehouse employees—would constitute separate bargaining units. The parties stipulated that for purposes of this case store and warehouse are single employer.

(3) The pickets who were ordered away from in front of the store were employees of this single company. They were regular employees of the warehouse, then on strike. They were not strangers to the employer—such as paid outside organizers or union agents might be.

(4) The Board is not called upon to decide in this case whether the Union may picket, in the circumstances of this situation, anywhere outside the enclosed mall, out on the parking lot or on the encircling walks. The sole question is the right of employees to picket immediately in front of the Butler store in the general walking area used by the invited public at large. At one point in his testimony Douglass Ballard, manager of the Respondent landlord at the time, said that when he ordered the pickets to get out of the mall, he told them they could picket outside on the parking lot or on the distant public roads. In his earlier statement, sworn to on February 12, 1971 and attached to the signed stipulation of fact, he said he told the pickets they must go outside the entire property, or on the public roads. And three of the pickets, who also testified at the remand hearing, said this was precisely what he told them at the time of the events and no more. In defense the Respondent argues, and repeats in its brief, that the pickets could have gone out on the parking lot, and therefore had no right to

complain. Not only is this contrary to the fact (I do not credit Ballard's testimony in this respect), but the Respondent reasserts in the same brief that it has a right to eject the pickets from the parking lot area, if one day it should so choose. Whether union pickets may enter upon the privately owned parking lot of an enclosed large shopping center such as this is a question of law that will one day be decided by the Board, and not by the management of this mall or by the Respondent's attorney.

(5) Perhaps more importantly than anything else, this parking lot is not to be compared to the property and parking area belonging to a single store or plant, immediately adjacent to the work area, in front or next to it, and used exclusively by the employees or customers of a lone employer. In this parking lot—accommodating over 2600 cars—the employees of 60 employers come and go, and the entire population of greater Atlanta is invited to do business. The case which the Supreme Court considered in *Central Hardware* is therefore not precedent for what the law may be on this set of facts. Indeed, *Babcock and Wilcox,* now said to have enunciated a rule of law applicable to private property, generally, itself was only concerned with a parking lot exclusively used by the employees of one company. If leaflet distribution, or picketing, whatever the Section 7 rights being exercised by a union may at the moment be, meets the "reasonable access" test outside the parking lot of such single employer property, it does not follow that the same conclusion must be reached in the case at bar.[1]

1. Nor is the Board's decision in *Nichols of Ohio,* 200 NLRB No. 161, on which the Respondent here also relies, dispositive of this case. There there were only 5 stores fronting on a common parking lot used by the tenants, and all the property was owned by a single operator. The single tenant with whom the union was in dispute was "by far the largest building in the group." I view that case as much more akin to the single company and single parking lot situation than like an enclosed 60 store mall 500 feet away from public property.

(6) The final and most significant reality that distinguishes this case from others said to have a pertinent relationship is that the "expressive activities" of the pickets who appeared before Butler Shoe Store engaged in conduct directly related to the purposes for which the DeKalb Mall is used. The Board's Remand Order speaks of "principles set out" in *Central Hardware* and *Lloyd* v. *Tanner;* "principles" means rules of law, judicial determinations of legal issues. The issue in *Tanner,* however, was whether private property must yield to publicity activity having nothing to do with the use for which the mall or shopping center exists, and the Court made clear that it was not answering the separate and distinct question whether the property need yield to mall-related activities. The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used." *Tanner* dealt with activists generally protesting against the war in Viet Nam. And to emphasize this important distinction in the balancing of private rights against picketing rights, the Court went out of its way to distinguish its earlier decision in *Logan Valley.* In *Logan* the pickets were publicizing a labor dispute with one of the tenant retail markets, and carrying on "expressive activity" directly related to the function and purpose of the mall center, albeit the question was examined in terms of constitutional free speech rights. The Court in *Logan* had said: "We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." 68 LRRM 2214.

The fact of the case; did the General Counsel prove there was no other means of access?

The fundamental and truly pertinent facts were set out in the parties' initial stipulation; they were not and could not be changed at the remand hearing. The public property nearest

to the Butler shoe store is about 500 feet away, at the highway intersections from which people and cars enter the parking lot that encircles the mall building. It now appears there are stop signs at three streets that reach the lot at one side, and that automobiles turning away from the 4-lane highway bordering two other entrances must slow down upon entering. As previously shown, there are four door-entrances to the mall itself, which is entirely closed at night. About 45,000 people visit the mall weekly, and they are drawn from the entire Atlanta area, including the outlying districts. The shopping center is located beyond the city limits.

The Respondent argues for dismissal of the complaint on the ground that at the remand hearing the General Counsel offered no additional testimony in support of the assertion that to exclude the union from the private property of the landlord in this case would leave it without reasonable access to that segment of the public with which it wished to communicate. The position ignores the record as a whole and misconceives the theory of complaint. The facts upon which the General Counsel relies are that Butler is only one of 60 stores fronting on the same common inside walkways for prospective customers, that the closest public area—i.e. not privately owned—is 500 feet away from the store, that a message announced orally or by picket sign at so great a distance from the focal point is too greatly diluted and dispersed, and that in consequence the inside aisles of the structure are comparable to the main streets of America. He argues that to relegate the pickets to the public highways in this case is tantamount to forcing the pickets off any public sidewalk in front of any retail store and limiting their activities to a street intersection perhaps 3 blocks away in the center of town, with 30 or 40 stores between them and the employer involved in a labor dispute.

Realistically, the Supreme Court agreed with this factual view of the case. Again and again in the *Logan Valley* case the Court spoke of the shopping mall there involved as the

General Counsel's brief speaks of the DeKalb Mall here. "The shopping center here is clearly the functional equivalent to the business district of Chickasaw involved in Marsh . . . there is no power on respondent's part to have petitioners totally denied access to the community for which the mall serves as a business district . . . the shopping center serves as the community business block 'and is freely accessible and open to the public in the area and those passing through.' "

Continuing with such realistic view of the facts, one must ask: who, or what people is it that the pickets wanted to alert to Butler's labor disputes? It is only with this question fairly answered that the ultimate *Babcock and Wilcox* test can be applied. It was not only the few immediate employees of the one small shoe store, nor was it the entire population of Atlanta and its surrounding areas. It was, instead, those members of the buying public who might, when seeing the window display of Butler's shoes inside the mall, think of doing business with that one employer. The test of reasonable access to the individual employees of one nonunion employer, as considered in both *Central Hardware* and *Babcock and Wilcox*, is therefore totally inapposite here. No more persuasive, or perhaps even relevant, is the evidence offered by the Respondent to prove what methods a merchants' association will use to advertise their combined selling activities to the public at large. The first group is too small and the second too large to fit this case. If the pickets are to be excluded from this extensive private property because the home addresses of a few store employees are available, or because they live not far away, the right to reach Butler's prospective customers would be ignored.

As to the Respondent's insistence that there were other means of communication available to the Union—existing methods for conveying its message to Butler's customers—very little that is new was offered at the hearing. It may be said that the Board had perfect knowledge of the additional facts offered by the Respondent, indeed that every court of the land today has of-

ficial notice of it all. The 60 merchants of the DeKalb Mall are organized for the purposes of acting together and sharing the cost of attracting people from all over to visit this mall. They use television commercials, radio announcements, newspaper spreads (weeklies and dailies), mass mailings and billboards (a billboard sign must normally stay up 6 months to be economically justified). There is no person throughout the broad area of Atlanta who hears or sees these messages but who is not a pinpointed object of the association's concern. Not so the people the pickets sought to reach; their audience was limited to Butler's customers, and them alone. Can it be said that because 60 merchants together find it profitable to advertise their wares on prime television time throughout the county, or to bear the cost of a professional advertising agency, these are the "reasonable" means of communication which employee pickets must use to bring attention to their labor dispute with a single shoe store in the mall? Is the Union required to squander its assets in this fashion, to dilute and dissipate its message throughout the land, because employers collectively choose to insulate their business activities behind the technically private property fence of their landlord? I think not. The proper aims of the business men are too dissimilar in scope and character to serve as restrictive parallel for the equally just objectives of union pickets.

Equally irrelevant and unpersuasive are other facts offered by the Respondent on the question of alternative reasonable access. It proved that not far away from the mall there is a post office building, a court house, a police station, public schools, and even a large incinerator. Presumably this was to show that considerable groups of people congregate at or pass near those structures, and that the pickets could have carried their message to them at those locations. The Respondent even made it a point to establish that near Atlanta there is a large Ford Motor Company plant and a Lockheed installation. Was the reasonable alternative to picketing the Butler store, where the labor

dispute centered, that the pickets could picket the entrances to Ford and Lockheed? But see Section 8(b)(4) of the Act; *Denver Building and Construction Council,* 301 U. S. 675.

There is a strong indication in Supreme Court language itself that in a shopping center of this magnitude, so much the modern day counterpart to the main streets of old, the distant public highway—500 feet away from the struck employer—is too far away if the pickets are not to be denied their lawful right under Section 7 of the Act to bring their proper message to Butler's customers. The public roads were from 350 to 500 feet away in the shopping center considered in *Logan Valley,* and there were only 15 stores as yet opened and doing business at that time. The Court stressed the difficulty of conveying a message from the public roadway to the particular customers of a single store among the many in that case, and even the possible danger of the picket at the public roads. The significant part of the decision was that the message was properly intended for a limited group among the great many members of the public who of necessity were invited to visit the large group of merchants.

Clearly the test now to be applied to the case at bar is that set out in *Babcock and Wilcox*. Has the General Counsel proved the Union had no other reasonable access to Butler's customers coming to the DeKalb shopping center? I think the answer, based upon the record as a whole, must be yes. Exclusion of the pickets to the distant highways would mean denial of the union's recognized right to bring a psychological pressure upon persons doing business with the struck employer, customers and employees alike. With the efficacy of the tactic decreasing markedly as the locus of the action is removed from the employer's place of business, it cannot be fairly said that picketing at the highways bordering the entire DeKalb mall is a reasonable alternative to picketing the shop or store premises itself.

Recommendation

There is no sufficient reason on the basis of the expanded record as now made for the Board to depart from its conclusion of law reached in the original decision. I therefore recommend that it reaffirm that finding and adhere to the remedial order issued there.

/s/ THOMAS A. RICCI
Thomas A. Ricci
Administrative Law Judge

Dated at Washington, D. C., April 9, 1973.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SCOTT HUDGENS, An Individual and LOCAL 315, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO	Case 10—CA-8823

DECISION AND ORDER

Upon charges filed by the Charging Party, Local 315, on January 25, 1971, the General Counsel of the National Labor Relations Board by the Regional Director for Region 10 issued a complaint and notice of hearing on February 24, 1971, against Respondent, Scott Hudgens. The complaint alleges in substance that Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, as amended. In its duly filed answer, the Respondent admits certain allegations of the complaint, denies all unfair practice allegations, and avers lack of information and belief as to certain other allegations.

On March 24, 1971, the parties, including the General Counsel, entered into a stipulation in which, *inter alia*, they requested that this proceeding be transferred to the Board. In the stipulation the parties agreed in effect that the formal papers filed in this proceeding, the stipulation, together with the attached exhibits, and the Order Postponing Hearing Indefinitely would constitute the entire record in the case and agreed that no oral testimony was necessary or desired. They waived their right to a hearing before a Trial Examiner, the making of findings of

fact and conclusions of law by a Trial Examiner, and the issuance of a Trial Examiner's Decision. The stipulation provided for the filing of briefs with the Board.

On March 25, 1971, the Regional Director issued an Order Postponing Hearing Indefinitely. On March 30, 1971, the Board issued its Order Granting Motion Approving Stipulation and Transferring Proceedings to the Board. Respondent and the General Counsel filed briefs thereafter.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the entire record in this case, including the briefs of the General Counsel and the Respondent, and makes the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is, and has been at all times material herein, an individual employer, with an office and place of business located in Atlanta, Georgia, where he is engaged in the selling and leasing of real estate and the development of property in the State of Georgia. Respondent, during the past calendar year, which period is representative of all times material herein, received gross revenue in excess of $100,000 from leases for floor space with tenants in the North DeKalb Shopping Center, Decatur, Georgia. During the same period and pursuant to the aforesaid leases, Respondent received gross revenue in excess of $25,000 from tenants, including F. W. Woolworth Company and Butler Shoe Company, some of whom annually have a gross volume of business in excess of $500,000 and purchase and receive products valued in excess of $50,000 directly from suppliers located outside the State of Georgia. Accordingly, we

find that the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction in this proceeding.

II. The Labor Organization Involved

The parties agree and we find that Local 315, Retail, Wholesale & Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The North DeKalb Shopping Center is located at Lawrenceville Highway and North Druid Hills Road in DeKalb County, Georgia. There are three entrance roads into the center, one from Lawrenceville Highway and two from North Druid Hills Road. Between the shopping center complex and the entrances from North Druid Hills Road and Lawrenceville Highway there is a parking area with parking spaces and driveways lined off thereon. The shopping center complex is completely surrounded by parking facilities.

There are approximately 60 stores in the center. The shopping center complex has an enclosed mall with four primary entrances, each approximately 20 feet in width with six or eight swinging doors on each. Some of the stores at the center have entrances only to the parking lot and cannot be reached via the enclosed mall and cannot be reached directly from the parking area, while a few stores have entrances from both the enclosed mall and the parking area. Butler Shoe Company's retail store can be entered only from the enclosed mall. Eighty-five to 90 percent of the customers who shop at those stores which have entrances only from the mall enter the shopping center complex through one of the four primary entrances.

On or about January 22, 1971, at or about 9:30 a.m., four employees of Butler Shoe Warehouse, located at 204 Brook-

wood Drive, N. E., Atlanta, Georgia, appeared in the North DeKalb Shopping Center mall with picket signs reading, "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315." These pickets were sitting on a bench, inside the mall area, near the Butler Shoe Store waiting for the store to open. Respondent's general manager, Douglas C. Ballard, a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent, approached the pickets and told them that picketing was not permitted in the enclosed mall and, if they did not leave, they would be arrested. The pickets left but returned within the hour and began picketing with their signs in front of the entrances to Butler Shoe Store in the mall corridors. Picketing continued for about 30 minutes when a picket was called to a phone and told by Manager Ballard that the pickets would have to leave. According to the picket, Ballard said that if they did not stop picketing he would have the police out there in 30 minutes and have them locked up. Ballard, however, did not recall telling the picket on the phone that he would have them arrested.

Also, on January 22, 1971, Respondent's attorney stated to the Charging Party's attorney that the picketing could not be permitted within the enclosed mall and that if the pickets did not leave, after being requested to do so, the Respondent would call the DeKalb County Police and obtain warrants for their arrest for criminal trespass. Thereafter, the pickets left the premises.

The sole issue in this case is whether, in the circumstances, the threat to arrest employees engaged in peaceful picketing of a business enterprise located within an enclosed mall shopping center is violative of Section 8(a)(1) of the Act.

The General Counsel contends that the above issue has been resolved by the Supreme Court in *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968), wherein the Court held that an injunction

by state court prohibiting, on grounds of trespass, picketing of a nonunion supermarket located in a shopping center violated the pickets' right of free speech. The Court relied on the circumstances that the shopping center served as a community business block and was open and accessible to the people in the shopping area as well as those passing through. The fact that the property was privately owned, rather than consisting of a public street and ways was not in the Court's view sufficient to justify restrictions on the place of picketing. The General Counsel further contends, relying on *Priced-Less Discount Foods Inc. d/b/a Payless,* 162 NLRB 872, that since the place of picketing was legal, and since the picketing is protected as a concerted activity under Section 7 of the Act, the threat to arrest the pickets for engaging in a protected concerted activity is violative of Section 8(a)(1) of the Act.

Respondent would distinguish the present case from *Logan Valley* on grounds that an enclosed mall shopping center is not analogous to a community business block but is rather analogous to the various departments within a store, and on the further ground that whereas in *Logan Valley* the picketing could be conducted only in the shopping center or adjacent to the public highway, here the pickets had a right to utilize the parking areas and sidewalks surrounding the enclosed mall. The record establishes, however, that Manager Ballard told the pickets they would have to picket on North Druid Hills Road or Lawrenceville Highway.

On the stipulated record, we find no evidence indicating that the enclosed mall is not generally open to public access during normal business hours when the picketing occurred. We further find that there is no evidence that the picketing involved herein unduly interfered with the normal use of the mall by either the Respondent, its lessees, or other members of the public. We also find that the picketing was peaceful and in conjunction with a labor dispute and therefore was protected

activity within the meaning of Section 7 of the Act. In these circumstances, we find that *Logan Valley* establishes the Union's right to picket at the location it chose, and that the Respondent's threats to cause the arrest of the pickets for criminal trespass if they continued to refuse to leave the enclosed mall unlawfully interfered with protected concerted activities, in violation of Section 8(a)(1) of the Act.

Conclusions of Law

1. Scott Hudgens, an Individual, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 315, Retail, Wholesale & Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to cause the arrest of the Charging Party's pickets, employees of Butler Shoe Company's warehouse, while they were engaging in protected activity under Section 7 of the Act, the Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Effect of the Unfair Labor Practice Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondent violated Section 8(a)(1) of the Act, we shall order that it cease and desist therefrom and that it takes certain affirmative action which will effectuate the policies of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Scott Hudgens, an Individual, his agents, successors, and assigns, shall:

1. Cease and desist from threatening to cause the arrest of any union members while peacefully picketing as part of protected concerted activity within the enclosed mall area of Respondent's shopping center, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection; and to refrain from any and all such activities.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Post at his office and other conspicuous places in the North DeKalb Shopping Center copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent, or his authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be main-

1. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., August 16, 1971.

John H. Fanning,
Member

Gerald A. Brown,
Member

Howard Jenkins Jr.,
Member

(Seal)

National Labor Relations Board